Supreme Court, U.S.
FILED

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No. _____

IN THE SUPEME COURT OF THE UNITED STATES
October Term, 1995

CLARA M. HESS,
Petitioner,

v.

STEVEN MacASKILL, DIRECTOR,
Women's Correctional Center,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the right against self-incrimination was violated in this case.

2. Whether there was a failure to give Clara Hess advice of rights upon a court-ordered psychological and psychiatric evaluation and right to counsel.

3. Whether the Court erroneously failed to consider the application of State law.

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Clara M. Hess respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

REPORT OF OPINIONS BELOW

Clara M. Hess v. Steven MacAskill, Director, Women's Correctional Center, No. 94-35445, an unpublished decision of the Ninth Circuit Court of Appeals, dated September 20, 1995. Petition for Rehearing denied October 19, 1995.

Clara M. Hess v. Steven MacAskill, Director, Women's Correctional Center, No. CV 93-133-BLG-RWA, Memorandum and Order of the United States District Court for the District of Montana, Billings Division, dated March 4, 1994.

Clara M. Hess v. Steven MacAskill, Director, Women's Correctional Center, No. CV 93-133-BLG-RWA, Memorandum and Order (request for new trial denied) of the United States District Court for the District of Montana, Billings Division, dated April 14, 1994.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 20, 1995. The Petition for Rehearing was denied on October 19, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution:

Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."

Sixth Amendment: "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

The defendant, Clara M. Hess, was charged by Information filed in the District Court of the State of Montana on October 23, 1989, with the crime of deliberate homicide. The defendant appeared on October 24, 1989, and entered a plea of "Not Guilty". She is alleged to have killer her husband at their home north of Livingston, Montana.

During the course of the proceedings, the State moved for a psychiatric and psychological examination of Clara M. Hess. This motion was made on January 17, 1990. The Court granted such motion by order date March 27, 1990, requiring such examination, and upon refusal to do so, imposing a sanction that Clara Hess could not produce the expert on Battered Woman Syndrome, Dr. Lenore Walker of Denver, Colorado, upon her refusal to submit to such examination. Under protest, and the Court's order imposing sanctions, the defendant submitted to such examination, and the State's experts testified at the time of trial against her.

This case came on for trial on August 20, 1990, and on August 30, 1990, the jury returned a verdict of "Guilty" of mitigated deliberate homicide, a felony. Clara Hess was sentenced on September 26, 1990, to a term of thirty years, plus an enhanced term of five years for use of a weapon, to be served consecutively.

On March 10, 1992, the Supreme Court of the State of Montana issued its opinion affirming the decision of the trial court. Petition for rehearing was filed in a timely fashion and denied by the order of the Court dated March 31, 1992.

On August 10, 1993, petitioner, having exhausted her remedies in State Court, filed a Petition for Writ of Habeas Corpus. During the course of those proceedings, the State of Montana conceded that petitioner had exhausted her remedies in State Court. Respective motions for summary judgment were filed by the parties, and on March 4, 1994, the Federal District Court granted the State's motion for summary judgment. A timely motion for new trial and motion to alter or amend the judgment as a matter of law was filed on March 14, 1994. The Court, by its order dated April 14, 1994, denied post judgment relief. A notice of appeal was timely filed to the Ninth Circuit Court of Appeals on May 2, 1994.

With respect to the issues presented in this Court, the following dialogue took place between Court and counsel which is set forth verbatim:

> "MR. MOSES: I want to make our position perfectly clear. If the Court is going to make a ruling, as I understand it, that you

> are compelling, you are ordering Mrs. Hess to submit to and to communicate with the experts for the State of Montana for the purpose of having available at trial the testimony of these experts at the time of trial, that she is compelled to do that? Now, I understand that is in essence what the Court has ordered.
>
> "THE COURT: Well, I am granting the motion, so that's the end result." [Tr. p. 111.]

With respect to the issues presented in this case, the following facts appear without contradiction:

Dr. Stratford conceded that a mental disease or defect was not involved in this case. [Tr. p. 196.] He further conceded that he was not taking into account what rights she had. There was no advice of rights, and counsel was not permitted to be present, and the testimony of the two expert witnesses for the State was obtained for the use at trial. Both experts for the State testified as to their examination of the defendant, Clara M. Hess. They were permitted to be in the courtroom and to listen to the testimony. (All other witnesses were excluded.)

REASONS FOR GRANTING THE PETITION

I. Right Against Self-Incrimination.

In this case. Clara M. Hess, through her counsel of record, objected to and raised her constitutional right against self-incrimination. No notice of mental disease or

defect as required by State law was given. Notice of self-defense was provided.

A clear statement of the rule is set forth in *United States v. Perez-Franco*, 873 F.2d 455 (1st Cir. 1989). There, in summary, the Court said:

> ". . . As was summed up in *Cunningham*, 431 U.S. at 806, 97 S.Ct. at 2136, the cases 'settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized.' "

See *United States v. Frierson*, 945 F.2d 650 (3rd Cir. 1991).

The following cases should place into proper perspective rules with respect to the protection of the Fifth Amendment.

In *Bellis v. United States*, 417 U.S. 85, 40 L.Ed.2d 678, 94 S.Ct. 2179, the Court said:

> "It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In Boyd v. United States, 116 US 616, 29 L.Ed. 749, 6 S.Ct. 538 (1886), we held that 'any forcible and compulsory extortion of a man's own

> testimony or of his private papers to be used as evidence to convict him of crime' would violate the Fifth Amendment privilege. Id., at 630, 29 L.Ed.2d 746; see also id., at 633-635, 29 L.Ed. 746; Wilson v. United States, 221 US 361, 377, 55 L.Ed. 771, 31 S.Ct. 538 (1911)."

In *Fisher v. United States*, 425 U.S. 391, 48 L.Ed.2d 39, 96 S.Ct. 1569, the Court said:

> "If the Fifth Amendment protected generally against the obtaining of private information from a man's mouth or pen or house, its protections would presumably not be lifted by probable cause and a warrant or by immunity. The privacy invasion is not mitigated by immunity; and the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness." (Emphasis supplied.)

We are reminded that it is not the Chancellor's foot or "weighing the equities" that determines the application of the Fifth Amendment, and the above case makes this very clear.

See *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489, and *Murphy v. Waterfront Commission of New York*, 378 U.S. 51, 12 L.Ed.2d 678, 84 S.Ct. 1594.

In *Escobedo v. Illinois*, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758, the Court held as follows:

> " `[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby'. (Emphasis in original.)"

See also *Berkemer v. McCarty*, 468 U.S. 420, 82 L.Ed.2d 317, 104 S.Ct. 3138.

See *Estelle v. Smith*, 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866.

In *Buchanan v. Kentucky*, 483 U.S. 402, 97 L.Ed.2d 336, 107 S.Ct. 2906, the Court said:

> "Moreover, Smith's counsel neither had placed at issue Smith's competency to stand trial nor had offered an insanity defense. See id., at 457, and n 1, 458, 68 L.Ed.2d 359, 101 S.Ct. 1866.

See *Garrity v. New Jersey*, 385 U.S. 493, 17 L.Ed.2d 562, 87 S.Ct. 616, where the Court said:

> "`Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary . . . .' Id., at 70, 63 L.Ed. at 133.
>
> "Where the choice is `between the rock and the whirlpool,' duress is inherent in deciding

to 'waive' one or the other.

* * *

> "In that case appellant paid under protest. In these cases also, though petitioners succumbed to compulsion, they preserved their objections, raising them at the earliest possible point. Cf. Abie State Bank v. Bryan, 282 US 765, 776, 75 L.Ed. 690, 703, 51 S.Ct. 252. The cases are therefore quite different from the situation where one who is anxious to make a clean breast of the whole affair volunteers the information."

See also *Spevack v. Klein*, 385 U.S. 511, 17 L.Ed.2d 574, 87 S.Ct. 625. Further approval of *Garrity v. New Jersey*, is *United States v. White*, 887 F.2d 2267 (D.C. Cir. 1989).

In this case, the Court ruled that Clara Hess could not produce an expert to testify as to "the Battered Woman Syndrome" unless she submitted to a psychological and psychiatric examination by the State. The significance of this case is that to be able to assert the Battered Woman Syndrome by expert testimony you are required to give up your right against self-incrimination. That, in our judgment, is wrong.

II. Advice of Rights.

During the course of the trial and the proceedings had and taken in this case, counsel has repeatedly and continuously raised the issue presented in *Estelle v. Smith*,

supra, which flatly states that if a defendant is subjected to a psychiatric or other mental examination he (or she) must be given their constitutional rights prior to any testimonial examination. The Court said:

> " 'Volunteered statements. . . are not barred by the Fifth Amendment,' but under Miranda v. Arizona, supra, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. Id., at 478, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974. These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand.

This has application in the case at bar.

III. Right to Counsel.

Again, reference must be made to *Estelle v. Smith*, *supra*, as setting forth the right to counsel. There, the Court said:

> "The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that '[i]n all criminal prosecutions,

the accused shall enjoy the right . . . to have the assistance of counsel for his defence.' The 'vital' need for a lawyer's advice and aid during the pretrial phase was recognized by the Court nearly 50 years ago in Powell v. Alabama, 287 US, 45, 57, 71, 77 L.Ed. 158, 53 S.Ct. 55, 84 ALR 527 (1932). Since then, we have held that the right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer 'at or after the time that adversary judicial proceedings have been initiated against him . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' Kirby v. Illinois, 406 U.S. 682, 688=689, 32 L.Ed.2d 411, 92 S.Ct. 1877 (1972) (plurality opinion); Moore v. Illinois, 434 U.S. 220, 226-229, 54 L.Ed.2d 424, 98 S.Ct. 458 (1977). And in United States v. Wade, 388 U.S. at 226-227, 18 L.Ed.2d 1149, 87 S.Ct. 1926, the Court explained:

" 'it is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.' (Footnote omitted.)

"See United States v. Henry, 447 U.S. 264, 65 L.Ed.2d 115, 100 S.Ct. 2183 (1980); Massiah v. United States, 377 U.S. 201, 12

L.Ed.2d 246, 84 S.Ct. 1199 (1964). See also White v. Maryland, 373 U.S. 59, 10 L.Ed.2d 193, 83 S.Ct. 1050 (1963); Hamilton v. Alabama, 368 U.S. 52, 7 L.Ed.2d 114, 82 S.Ct. 157 (1961)."

In this case, counsel was not permitted to be present at every stage of the proceedings. The significance in this case is that the client cannot anticipate or understand when she needs an attorney. The attorney must be psychic to anticipate the testimony that might be used against her. In this case, Dr. Stratford, the State's psychiatrist, testified by demeaning Clara Hess. Of equal importance is the fact that in the absence of an attorney, she was not given her constitutional rights. The State asserts that she must have known her constitutional rights at that time, since she had an attorney. We respectfully submit this is wrong.

IV. The Court erroneously failed to consider the application of State law.

The appellate court, in its decision, took the view that matters of interpretation of State law are matters of concern for State judicial proceedings. We respectfully submit this is erronous under the facts and circumstances of this case.

In *Knapp v. Cardwell*, 667 F.2d 1252 (9th Cir. 1982), the appellate court held that the construction of a state statute must be treated as if it had been incorporated into the words of the statute and the state courts have the final authority to interpret state legislation. That part of the law is clear. The Court went on, however, to point out that federal courts will not review a state Supreme

Court interpretation of its own statute unless that interpretation is clearly untenable . . . (as a deprivation of rights guaranteed by the Constitution).

This case is supported by *Oxborrow v. Eikenberry*, 877 F.2d 1395 (9th Cir. 1989).

McSherry v. Block, 880 F.2d 1049 (9th Cir. 1989). In that case, the Court held [citing cases] that "our task is only to decide whether the state court's interpretation of its own law is so unexpected, so outlandish that no reasonable person could ever have expected it" [citing *Bouie v. Columbia*]. "We must decide only whether the construction actually given the statute was foreseeable." Due process and ex post facto laws are likewise affected as constitutional violations.

In *Devine v. New Mexico Department of Corrections*, 866 F.2d 339 (10th Cir. 1989), the question of foreseeability was answered in this fashion:

> "The court has stated only that a decision is unforeseeable if it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." [Citing *Bouie v. Columbia*.]

In *Bouie v. Columbia*, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697, the Supreme Court had occasion to consider the "drug store sit-in" and the application of the trespass law in the State of South Carolina. The Supreme Court of South Carolina had ruled that the new version of the trespass law was constitutional, and the Supreme Court of the United States reversed. In that case, the Court held

there was a violation of due process that may be accomplished by a state judiciary in the course of construing an otherwise valid state statute. It not only is a violation of due process, but is a violation of the ex post facto law as it applies not only to legislative action, but to judicial decisions as well. That case was not considered on the appeal and is applicable to Mrs. Hess. What has happened in this case is that the Supreme Court of Montana and the Federal District Court have taken insanity statutes and simply expanded their meaning and the concept to apply to self-defense in this case. As previously indicated to the Court, the prosecution is bound to prove act and mental state beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450, seemingly set this issue at rest, requiring the State to prove its case beyond a reasonable doubt and not requiring the defendant to come forth with some burden to defeat the charges in that case.

What has happened in this case is that the appellate courts have expanded the meaning and concept of the plain law to assert that the "Battered Woman Syndrome" is "akin" to mental disease or defect and justifies a mental examination by experts for ths State. This simply expands the meaning and concept of State law to levels that could not be anticipated. It is clear that the Battered Woman Syndrome has never been included or considered by the DSM-III-R or the DSM-IV as a mental disease or defect. To suggest it is akin to a mental disease or defect and covered by the insanity statutes is to expand, without justification, the law in that respect.

Obviously, if you provide notice that you "may call" an expert to testify as to the Battered Woman Syndrome,

that, as a result of that notice, the defendant must submit to mental examination. In essence, this violates the right against self-incrimination by unanticipated and clearly unforeseeable construction of the laws of the State of Montana.

It is our belief that the decision of the Courts to use the Battered Woman Syndrome as a mental disease or defect is without foundation, either in the law or in medicine. It is adding a new interpretation of the law which was never foreseeable and contrary to the rules of statutory construction as set forth in the following cases: *TVA v. Hill*, 437 U.S. 153, 57 L.Ed.2d 117, 98 S.Ct. 1279; *United States v. Albertini*, 472 U.S. 675, 86 L.Ed.2d 536, 105 S.Ct. 289, where the Court said:

> "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. [Citing cases.]"

United States v. Monsanto, 491 U.S. 600, 105 L.Ed.2d 512, 109 S.Ct. 2657. In that case, the effort was made to exempt attorneys' fees on forfeiture proceedings, and the Court clearly held that you cannot add to the plain language of the statute. In *Heckler v. Mathews*, 465 U.S. 728, 79 L.Ed.2d 646, 104 S.Ct. 1387, the Court said as follows:

> "Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of the statute or judicially righting it.

[Citing cases.]"

See also *Freytag v. Commissioner*, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), where the Court held that where the terms of the statute are unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances. We can likewise quote *In re Bonner Mall Partnership*, 2 F.3d 899 (9th Cir. 1993). There the Court held that the interpretation of the statutory provision must begin with the plain meaning of its language and where the statutory language is unambiguous, the judicial inquiry is complete, citing *Pennsylvania Public Welfare Department v. Davenport*, 495 U.S. 552, 110 S.Ct. 2126, 109 L.Ed.2d 588; *Connecticut National Bank v. Germain*, ___ U.S. ___, 112 S.Ct. 1146, 117 L.Ed.2d 391.

As a final comment, it is to consider this case from a defense lawyer's perspective. Can he advise the client that she has the full protection of the Fifth Amendment? Can he advise the client that the statutes do not authorize a psychiatric or psychological examination in this case? Can he advise the client that she need not give up one constitutional right as a sanction for the sake of exercising another constitutional right? Can an attorney advise the client that self-defense is based upon fear and is not under any circumstances a mental disease or defect, and those statutes are simply inapplicable because they don't apply to her case? And, can a lawyer properly advise a client that if she may use a witness in her defense case that she must be required to submit to a mental examination, and that such mental examination raises not only an issue not required to be proven by the State beyond a reasonable doubt, but places a burden upon her to produce testimony in her own behalf, contrary to Supreme Court decisions?

Is the attorney bound to anticipate that the Courts will change the law and not consider the state statutes that are applicable or give them a new face that could not be anticipated? This seems a terrible burden to bear.

CONCLUSION

For the reasons stated and the authorities cited, the petitioner, Clara M. Hess, prays that this Honorable Court grant his Petition for a Writ of Certiorari.

DATED this 21st day of February, 1996.

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EDITOR'S NOTE

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PETITION FOR WRIT OF CERTIORARI TO THE
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U.S. Court of Appeals

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARA M. HESS, Petitioner-Appellant, v. STEVEN MacASKILL, Director Women's Correctional Center, Respondent-Appellee.	)	No. 94-35446 D.C. No. CV-93 -00133-RWA MEMORANDUM[1]

Appeal from the United States District Court
for the District of Montana
Richard W. Anderson, Magistrate Judge, Presiding

Argued and Submitted, August 11, 1995
Seattle, Washington

---

[1] This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: BEEZER and HAWKINS, Circuit Judges, and TEVRIZIAN, District Judge.[2]

Clara Mae Hess filed this petition for a writ of habeas corpus arguing that her Fifth and Sixth Amendment rights were violated. She argues that her Fifth Amendment rights were violated when the Montana State District Court ("state trial court") ordered her to submit to psychological and psychiatric evaluations. She also argues that she was denied her Sixth Amendment right to counsel because her counsel was not permitted in the room during the court-ordered evaluations.

The district court had jurisdiction under 28 U.S.C. § 2254 and we have jurisdiction under 28 U.S.C. § 1291. The district court denied the petition and we affirm.

I

Hess was charged with deliberate homicide in the shooting death of her husband, William Hess. She pleaded not guilty and gave notice of her intent to rely on the defense of justifiable use of force based on the battered woman's syndrome. The notice stated that Dr. Lenore Walker, a known expert on battered woman's syndrome, was to examine Hess and testify at trial. The State then moved, and the state trial court ordered, a psychiatric and psychological evaluation of Hess by two State experts.

The state trial court's order limited the examination

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[2] The Honorable Dickran M. Tevrizian, United States District Judge for the Central District of California, sitting by designation.

by providing "that defendant need not answer any questions or produce any documents that she reasonably believes may incriminate her, and her attorney may be present in the waiting room of such examiner and may counsel defendant at recesses and meals." After Hess refused to undergo the court-ordered evaluations the state trial court ordered Lenore Walker's testimony excluded unless Hess submitted to the examinations. In July 1990, Hess submitted to the examinations.

Hess was convicted of mitigated deliberate homicide and was sentenced to thirty years with a five year enhancement for use of a weapon. The Montana Supreme Court affirmed the conviction holding that Hess "put her mental state at issue when she relied upon the affirmative defense of justifiable use of force and offered psychological evidence . . . to support that defense." As a result, her Fifth Amendment protection against self-incrimination was not violated. The Montana Supreme Court also held that Hess was not entitled to Miranda warnings nor was she entitled to have her attorney present in the room during the ordered evaluations. Hess subsequently filed this petition for habeas corpus making the same claims of error. The parties consented to submit the case to a magistrate judge for decision of all pending motions and entry of judgment. The magistrate judge denied the petition granting the State's cross-motion for summary judgment. Hess timely appealed.

II

We review de novo the denial of a petition for habeas corpus. Sanders v. Ratelle, 21 F.3d 1446, 1451 (9th Cir. 1994). The state court's findings of fact are reviewed for clear error and are entitled to a presumption of correctness under 28 U.S.C. § 2254 (d). Thomas v.

Brewer, 923 F.2d 1361, 1364 (9th Cir. 1991).

III

Hess first contends that the State could not force her to undergo the psychological and psychiatric examinations for they would cause her to incriminate herself. She argues that she did not put her mental state at issue because she raised a defense of self-defense and not a defense of insanity or diminished capacity.

In making this argument, Hess relies on Estelle v. Smith, 451 U.S. 454 (1981). In Estelle, a defendant charged with capital murder was sua sponte ordered to undergo a psychiatric examination to determine his competency to stand trial. id. at 457. After being found competent, the defendant was tried and convicted. At the ensuing sentencing phase, the State called the examining doctor, Dr. Grigon, to testify as to the defendant's future dangerousness, an element which must be proved beyond a reasonable doubt before the death penalty may be imposed. Id. at 460.

In reversing the sentence of death, the Supreme Court held "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him . . . ." Id. at 468.

The Court later held that this quoted language from Estelle "leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation

with evidence from the reports of the examination that the defendant requested." Buchanan v. Kentucky, 483 U.S. 402, 422 (1987). In Buchanan, the prosecution and the defense jointly moved for a mental examination for the purpose of determining whether the defendant should be involuntarily committed. Id. at 423. When the defendant later raised the "mental status" defense of "extreme emotional disturbance," the prosecution sought to introduce the reports of the psychiatrist in the rebuttal phase. Id. The Supreme Court held that the introduction of the report for the limited purpose of rebuttal was not a violation of the Fifth Amendment.

Subsequent Ninth Circuit case law has held that a defendant who puts his or her mental state at issue may be compelled to submit to psychiatric examinations. See, e.g., United States v. Phelps, 955 F.2d 1258, 1263 (9th Cir. 1992) (insanity acquittee places his insanity at issue by seeking release on the ground that he has recovered), cert. denied, 504 U.S. 989 (1992). Thus, when a defendant seeks to introduce evidence, through expert testimony, of insanity or diminished capacity, the prosecution is permitted to conduct an examination of the defendant by their own expert.

While a battered woman's syndrome defense is not technically a defense of insanity or diminished capacity, the essence of the defense is that the defendant was so affected by the abuse suffered that she believed she was in imminent danger of serious bodily injury. In order to present this defense, defendants rely on expert testimony, based on psychological and psychiatric testing and interviews, that the defendant suffers from symptoms

consistent with battered woman's syndrome. The state should be entitled to the same quality of evidence as the defense. The only way the state may rebut the defense is to conduct its own examination and present its own expert testimony.

The vast majority of state appellate courts to address this issue have held that a trial court has the inherent power to compel a defendant to submit to a mental evaluation when she asserts an affirmative defense of self-defense based on the battered woman's syndrome. See, e.g., State v. Myers, 570 A.2d 1260, 1266 (n.J. Super. Ct. App. Div. 1990), certification denied 604 A.2d 598 (N.J. 1990; State v. Hickson, 630 So.2d 172, 176 (Fla. 1993); State v. Briand, 547 A.2d 235, 237 (N.H. 1988).

The examination ordered in this case was limited. The state trial court ordered Hess to submit to an examination only if she intended to use the expert testimony of Dr. Lenore Walker. The State was permitted to have Hess examined by experts of its choosing but the State was only permitted to use this testimony during the rebuttal phase of the trial. Finally, any opinions and evidence gained from the evaluations could be used only to rebut Hess' battered woman's syndrome defense.

We hold that ordering Hess to submit to psychological and psychiatric examinations after she expressed her intent to rely on expert testimony to establish

the defense of battered woman's syndrome was not error.[1]

IV

Hess also argues that the State violated the Fifth Amendment because they did not inform her of her Miranda rights before the examinations. However, once Hess sought to introduce psychological evidence in support of a mental state defense, Miranda warnings before the psychological examination were no longer required. Hendricks v. Vasquez, 974 F.2d 1099, 1108 (9th Cir. 1992) (citing Powell v. Texas, 492 U.S. 680, 684 (1989)).

V

Hess next argues that her Sixth Amendment right to counsel was violated because her counsel was not permitted in the room during the ordered examinations. For support, Hess relies on Estelle v. Smith. In Estelle, Smith's counsel had neither notice of the evaluations nor an opportunity to consult with Smith about the nature of the evaluations. 451 U.S. at 471. The Court held that Smith was denied his Sixth Amendment right to counsel. Id. See also United States v. Garcia, 739 F.2d 440, 442 (9th Cir. 1984).

Unlike Estelle, Hess' counsel had notice of the ordered examinations and ample opportunity to consult with

---

[1] Hess' arguments concerning the applicability of Montana statutes to her case are unavailing. Federal habeas corpus relief may be granted only for violations of the federal constitution. See Estelle v. McGuire, 502 U.S. 62, 68 (1991). Any argument that the examinations were ordered in violation of Montana statutes is state error and habeas relief may not be had.

her. While not present in the room, Hess' counsel was present in the office of Dr. Walters during both of his meetings with Hess. Hess was able to consult with counsel during all breaks. Hess' counsel was again present in the office during Dr. Stratford's first examination and was available by telephone for the second.

Thus, Hess' counsel had notice of the examinations, was able to consult with Hess concerning the nature and scope of the examinations, was present in the waiting room during the examinations and was able to consult with Hess during breaks. This was constitutionally sufficient. See Buchanan v. Kentucky, 483 U.S. at 424. Hess does not have the further right to have her counsel physically present in the room during the course of the examination. See United States v. Bondurant, 689 F.2d 1246, 1249 (5th Cir. 1982) (defendant has no right to have counsel present in examining room). Hess was not denied her Sixth Amendment right to counsel during these psychiatric and psychological examinations.

VI

We hold that the state trial court did not violate Hess' rights under the Fifth Amendment by compelling her to submit to psychological and psychiatric examinations after she expressed her intent to assert a battered woman's syndrome defense. We also hold that Hess' Sixth Amendment right to counsel was not violated when her counsel was not permitted in the room during the evaluations. We affirm the denial of the writ of habeas corpus. AFFIRMED.

FILED
Oct 19 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARA M. HESS,	)	No. 94-35446
	)	
Petitioner-Appellant,	)	D.C. No. CV-93
	)	-00133-RWA
v.	)	
	)	ORDER
STEVEN MacASKILL, Director Women's Correctional Center,	)	
	)	
Respondent-Appellee.	)	

Before: BEEZER and HAWKINS, Circuit Judges, and TEVRIZIAN, District Judge.[1]

Appellant's petition for rehearing filed with the Court on October 4, 1995, is DENIED.

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[1] The Honorable Dickran M. Tevrizian, United States District Judge for the Central District of California, sitting by designation.

Wm. Nels Swandal
Park County Attorney
414 East Callender Street
Livingston, MT 59047
Phone: (406) 222-6120, Ext. 240

MONTANA SIXTH JUDICIAL DISTRICT COURT,
PARK COUNTY

THE STATE OF MONTANA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal #89-43
	)	
CLARA MAE HESS,	)	
	)	
Defendant.	)	

INFORMATION

WM. NELS SWANDAL, County Attorney for Park County, Montana, deposes and says:

On or about August 20, 1989, the above named defendant committed the offense of deliberate homicide, a felony, in violation of Montana law, Section 45-5-102, MCA, 1989, punishable by imprisonment in the state prison not less than ten (10) years or more than one hundred (100) years.

The facts constituting the offense are:
Defendant, on or about August 29, 1989, in

Park County, Montana, purposely or knowingly caused the death of William H. Hess injury by shooting him in the head with a .22 caliber pistol.

A list of possible witnesses for the State now known to the prosecution is as follows:

Charley Johnson, Sheriff	414 East Callender Street Livingston, MT 59047
Deputy Jerry Harmon	414 East Callender Street Livingston, MT 59047
Lee Keto, Undersheriff	414 East Callender Street Livingston, MT 59047
Deputy Gary Tanascu	Gardiner, MT 59030
Deputy Jay Fleming	Gardiner, MT 59030
Deputy Dan Wertz	414 East Callender Street Livingston, MT 59047
Deputy Ed Kinnick	414 East Callender Street Livingston, MT 59047
Deputy Doug Wonders	414 East Callender Street Livingston, MT 59047
Bob Childers	414 East Callender Street Livingston, MT 59047

Steve Covington	414 East Callender Street Livingston, MT 59047
Bruce Weeter	414 East Callender Street Livingston, MT 59047
Bill Deckard	414 East Callender Street Livingston, MT 59047
Sarah Leyde	Clyde Park, MT 59018
Bob Youngberg	Clyde Park, MT 59018
Ray Klimek	Clyde Park, MT 59018
Bill Leyde	Clyde Park, MT 59018
Dester Tank	Clyde Park, MT 59018
Bob Taylor	Clyde Park, MT 59018
Retha Myrstol	Clyde Park, MT 59018
Tony Bailey	Clyde Park, MT 59018
Ralph Myrstol	Clyde Park, MT 59018
Joe Magalsky	Clyde Park, MT 59018
Al Fries	Clyde Park, MT 59018
Tom Bailey	Clyde Park, MT 59018

Evelyn Myrstol	Clyde Park, MT 59018
Julie Long	State Crime Lab Missoula, MT 59802
Unknown personnel	State Crime Lab Missoula, MT 59802
Jack Davis	Park County Coroner Livingston, MT 59047
Dr. Kenneth H. Mueller	1233 North 30th Street Billings, MT 59101
William Deckard	Everet Police Department 3002 Wetmore Avenue Everet, WA Phone 259-0405
Agents from the Montana Criminal Investigation Bureau	Justice Building 215 N. Sanders Helena, MT 59620
Michael J. Miller Chief, MT ID Bureau	303 N. Roberts Helena, MT 59620-1418

DATED this 23rd day of October, 1989

s/ Wm. Nels Swandal
Park County Attorney

No. 91-005

IN THE SUPREME COURT OF THE
STATE OF MONTANA
1992

STATE OF MONTANA,

Plaintiff and Respondent,

-vs-

CLARA M. HESS,

Defendant and Appellant

APPEAL FROM: District Court of the Sixth Judicial District, In and for the County of Park, The Honorable Byron L. Robb, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Charles F. Moses argued, Attorney at Law, Billings, Montana.

For Respondent:

Hon. Marc Racicot, Attorney General, Helena, Montana; Jennifer Anders argued, Assistant Attorney General, Helena, Montana; John P. Connor, Assistant Attorney General, Helena, Montana; William Nels Swandal, County Attorney, Livingston, Montana

Submitted: November 6, 1991
Decided: March 10, 1992

Chief Justice J. A. Turnage delivered the Opinion of the Court.

Clara Hess (Clara) appeals her conviction for the mitigated deliberate homicide of her husband, William "Bill" Hess, following a jury trial in the Sixth Judicial District, Park County. We affirm. We rephrase the issues presented on appeal as follows:

1. Did the District Court err in requiring the defendant to submit to a psychiatric and psychological evaluation by the State's expert witness for use by the State in rebuttal?

2. Did the District Court err by giving inappropriate jury instructions?

Clara married William "Bill" Hess (Bill) in 1947. Years later, Bill initiated divorce proceedings; the couple divorced in 1964. After their divorce, the couple continued to live together. In 1972, the couple remarried. Clara testified that in June 1989, the two agreed to part, but neither party initiated legal proceedings.

During the years she lived with Bill, Clara testified that Bill was tempestuous and subjected her to physical, sexual, and verbal abuse. She testified that Bill threatened her with a gun on three occasions. She testified that Bill oftentimes controlled her freedom. She also testified, however, that she frequently traveled without Bill to Washington and stayed with family and friends, sometimes for several weeks at a time. She testified that she also made other trips without Bill, including trips to Canada,

Ohio and Disneyland. She further testified that she managed the checkbook and household finances of the couple, and had access to money from her mother's estate.

Some witness testimony supported Clara's depiction of Bill as abusive, controlling, and hot-tempered. Other witness testimony depicted Bill as kind-hearted and gentle, and depicted Clara as the dominant and oftentimes absent person in the marriage.

Clara testified that in September 1988, she sought medical attention for a leg injury resulting from Bill's physical abuse. Medical records indicate that Clara told a treating doctor that her leg injury was a result of a "burning membrane" that started after riding in a car and was aggravated after another car trip.

Both Bill and Clara enjoyed hunting. Clara testified that she engaged in target-shooting. Both owned and were accustomed to shooting various handguns and rifles. Clara kept a Beretta .22 pistol in a downstairs washroom and a .38 pistol in her bedroom. While traveling, she carried a loaded pistol in her purse. Bill kept several guns in his bedroom, including a High Standard .22 pistol.

On the evening of August 19, 1989, Clara and Bill were home alone. Clara testified that Bill said if she "didn't move back into his bedroom and do everything he wanted", he would tell Clara's then forty-four-year-old son about his true paternity. Clara testified that she responded to Bill's threat by sprinkling sleeping pills in Bill's tapioca pudding. After eating his tapioca pudding, Bill went upstairs to his bedroom and retired.

Clara testified that on the morning of August 20, 1989, she entered Bill's bedroom and Bill threatened to kill her. She testified that she believes Bill moved toward the dresser to retrieve the High Standard .22 pistol. She testified that she recalls grabbing the pistol from the dresser, but does not recall struggling with Bill, firing the pistol, or dropping the pistol. She recalls leaving Bill's bedroom and going to her bedroom for an undetermined amount of time. A pathologist later testified that Bill died from two gunshot wounds to the left temple of his head. The pathologist could not determine whether Bill was standing or lying down when he received the wounds nor whether Bill was shot from close range. A firearm and toolmark examiner testified that 1) two spent cartridge cases taken from the scene were shot from Bill's High Standard .22 pistol, and 2) of the two bullet fragments taken from Bill's skull, one bullet fragment was from a .22 bullet and the other was probably from a .22 bullet. The Park County Sheriff testified that Bill's High Standard .22 pistol was later found in Clara's bedroom under her pillow.

When Clara returned to Bill's bedroom some time later, she recalls seeing Bill on the floor with "some dark stuff coming out of his mouth." She placed a pillow under his head and a blanket over him and did not realize he was dead until sometime that afternoon.

That evening, Clara wrapped Bill's body in the blanket that covered him and tied his body with a rope to a rubber raft. She then dragged Bill's body downstairs and outside to a deep hole meant for a root cellar. She testified that she first placed straw in this hole, then Bill's body, then the box spring and the mattress from Bill's

bedroom. She later testified that she also placed into this hole a blood-stained piece of carpet that she had removed from Bill's bedroom. The Park County Sheriff testified that this hole additionally contained a piece of carpet padding from Bill's bedroom, a spent .22 casing, and another rubber raft. Clara testified that she covered the contents of the hole with dirt.

The next morning on August 21, 1989, Clara telephoned Bill's sister, Sarah Leyde (Sarah) and told her that Bill was ill and that the Leyde family should not come over to their house that day to help side the garage as earlier planned. Later that day, Sarah telephoned Clara to check on Bill's health, and Clara told her that Bill was still ill.

On August 22, 1989, Clara purchased and had delivered ten yards of garden dirt from a local company. She then asked a neighbor who had access to a backhoe if he could use the backhoe to fill in the remainder of the hole with the garden dirt. Additionally that day, Clara went over to Sarah's house and told Sarah that Bill had gone fishing, but she did not know where. On August 23, 1989, the neighbor using his backhoe filled in the hole meant for a root cellar with the garden dirt.

Thereafter, Clara left Montana and traveled to Washington to visit family. On August 24, 1989, she telephoned Sarah from Washington and told her that Bill was fishing in Alaska. On August 29, 1989, Clara telephoned Sarah from Washington and told her that Bill was at a fishing camp in Williams Lake, British Columbia, and she was going to drive there to pick him up. On

August 31, 1989, Clara telephoned Sarah and told her that Bill had died from a heart attack in Williams Lake, British Columbia, and his body had been cremated.

When Clara returned to her home in Montana, Sarah helped Clara pack Bill's belongings. Sarah became suspicious when Clara refused to allow anyone in Bill's locked bedroom because Clara claimed that Bill had killed a cat in his bedroom, leaving the floor stained. Sarah became suspicious when she found Bill's glasses and fishing tackle in his car. Acting on these suspicions, Sarah telephoned authorities in Williams Lake, British Columbia, to confirm Bill's death and was told that there were no records of his death or cremation. Sarah then telephoned local police, which resulted in an investigation and the eventual excavation of Bill's body. Clara was later arrested in Washington.

On October 23, 1989, Clara was charged by information with deliberate homicide under § 45-5-102, MCA. At her arraignment hearing on October 24, 1989, she pled not guilty to this charge. On December 11, 1989, Clara gave notice of her intent to rely upon the affirmative defense of "use of justifiable force or self-defense under the battered woman syndrome." This notice stated that Dr. Lenore Walker, a nationally known expert on battered woman syndrome, would examine Clara and testify at trial.

The State did not challenge Clara's reliance on the defense of justifiable use of force under battered woman syndrome, even though this defense has never been recognized in Montana. On January 12, 1990, however, the State gave notice of its intention to call Dr. Walters and

Dr. Stratford, both experts on battered woman syndrome, to rebut the testimony of Dr. Walker. The State further moved and the District Court ordered, a psychiatric and psychological evaluation of Clara by Dr. Walters and Dr. Stratford at State expense.

Clara twice refused to participate in this court-ordered evaluation and requested a writ of supervisory control from this Court. On April 11, 1990, the District Court sanctioned Clara and ordered that if she refused to participate in this evaluation, Dr. Lenore Walker would not be allowed to testify at trial.

On May 10, 1990, this Court granted limited supervisory control to Clara, and vacated the District Court's April 11, 1990 order regarding Dr. Lenore Walker's testimony. However, on May 16, 1990, this Court granted rehearing and vacated its May 10, 1990 order. In July 1990, Clara submitted to the court-ordered evaluation.

At trial, Dr. Walker testified that in her expert opinion, Clara suffered from battered woman syndrome. In rebuttal, Dr. Walters and Dr. Stratford testified that in their expert opinions, Clara exhibited some symptoms of post-traumatic stress disorder (battered woman syndrome category).

On August 30, 1990, a jury convicted Clara of mitigated deliberate homicide. On September 26, 1990, the District Court sentenced Clara to thirty years imprisonment for mitigated deliberate homicide and five years imprisonment for the use of a weapon in commission of an offense, fined her $15,000, and designated her a

nondangerous offender for parole eligibility purposes. From this conviction, Clara appeals.

1. Did the District Court err in requiring the defendant to submit to a psychiatric and psychological evaluation by the State's expert witnesses for use by the State in rebuttal?

Clara challenges, on both constitutional and statutory grounds, the District Court's authority to compel an independent psychiatric and psychological evaluation by State-chosen experts for use during rebuttal.

A. Constitutional Grounds

Clara argues that the compelled evaluation violated her Fifth Amendment right protecting her against self-incrimination; she argues that she in no way waived this right. Clara argues that her Miranda rights were violated as she was never informed prior to the compelled evaluation that she had the right to remain silent. Clara argues that her Sixth Amendment right was violated as she did not have counsel present during the compelled evaluation. Clara also argues that Smith v. McCormick (9th Cir. 1990), 914 F.2d 1153, is applicable to these facts as it supports the proposition that a compelled evaluation is prohibited constitutionally, as well as statutorily.

We agree with the State that Clara put her mental state at issue when she relied upon the affirmative defense of justifiable use of force and offered psychological evidence, the expert witness testimony of Dr. Lenore Walker, to support that defense. Accordingly, the State was

entitled to have Clara examined by expert witnesses of its own choosing and to have these expert witnesses testify for the limited purpose of rebutting Dr. Lenore Walker's testimony. State v. Briand (N.H. 1988), 547 A.2d 235. See also, State v. Goodwin (1991), 249 Mont. 1, 813 P.2d 953. We therefore hold that Clara's Fifth Amendment right against self-incrimination was not violated.

We further agree with the State that Clara was not entitled to Miranda warnings prior to the compelled evaluation because 1) Clara was represented by counsel, 2) said counsel was fully informed of the time and place of the evaluation, 3) Clara was not in custody at the time of the evaluation, 4) as discussed, Clara placed her mental state at issue, and 5) the compelled evaluation was limited to use for rebuttal only. See McNeill v. Fulcomer (E.D. Pa. 1990), 753 F.Supp. 1294.

Clara next argues that under the Sixth Amendment, she was entitled to have her counsel present during the compelled evaluation. The record indicates that Dr. Walters, a psychologist, examined Clara on July 11 and 12, 1990. Clara's counsel was present in Dr. Walters' office at both sessions, although he was not in the examination room. The record further indicates that Dr. Stratford, a psychiatrist, examined Clara during two separate sessions in July 1990. Clara's counsel, although not present in the examination room, was present in Dr. Stratford's office during the first session and was apparently in contact with her by telephone during the second evaluation.

In the District Court's February 5, 1990 order relating to the State's motion for a compelled psychiatric

and psychological evaluation by State experts, the Court ordered:

> B. That in [the] event defendant chooses to submit to such evaluation . . . her attorney may attend and be present . . . . The state shall thereafter also promptly furnish defense counsel with a true copy of any report or reports prepared by Drs. Stratford and Walters.
>
> C. That such evaluation shall be made subject to defendant's constitutional and statutory rights not to make statements or produce documents that may incriminate her, that the state's counsel and witnesses may use such examination only for determining the mental condition of defendant and for rebuttal, and that all experts and counsel shall keep their records and reports confidential except as necessary for use in trial of this case.

From the record in this case, the only information elicited by Dr. Stratford and Dr. Walters in their examinations related to the mental condition of Clara and their testimony was used only to rebut the testimony of Dr. Lenore Walker, Clara's expert witness. Accordingly, the testimony of Dr. Stratford and Dr. Walters stayed well within the parameters of the District Court's order.

Additionally, following a careful review of the entire record, we hold that this testimony did not prejudice Clara

and therefore is not a ground for reversal. See § 46-20-701, MCA. Dr. Stratford testified during cross-examination that he was unable to reach a conclusion on whether Clara suffered from post-traumatic stress disorder. Dr. Walters testified during cross-examination: "I am confident saying that [Clara] reports a number of symptoms that are consistent with post-traumatic stress disorder." Although Dr. Walters did not conclude that Clara suffered from post-traumatic stress disorder, he testified during cross-examination that based on his limited test results of Clara, "[i]t appears likely" that she suffers from post-traumatic stress disorder. Accordingly, the testimony of Dr. Walters and Dr. Stratford did not prejudice Clara regarding her defense of battered woman syndrome.

Clara also argues that Smith v. McCormick (9th Cir. 1990), 914 F.2d 1153, is applicable to these facts as it supports the proposition that a compelled evaluation is prohibited constitutionally, as well as statutorily. We disagree that Smith stands for this proposition; if anything, the language of Smith supports the State's position that, as a matter of trial fairness, the State must be provided an opportunity to rebut the evidence offered by the defendant's expert witness and that a compelled evaluation is proper:

> Consistent with the adversarial nature of the fact-finding process and the quasi-scientific nature of psychiatric opinion, the Ake court explicitly rejected the notion that psychiatrists can be expected to reach a unanimous diagnosis of the current mental condition of a defendant and unanimous prognosis as to future expected conduct or that there is such

a thing as "neutral" psychiatric testimony:

> "Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party."

Smith, 914 F.2d at 1157 (citing Ake v. Oklahoma (1985), 470 U.S. 68, 81, 105 S.Ct. 1087, 1095, 84 L.Ed.2d 53, 64-65). We therefore hold that Smith decision presents no basis for reversing this case.

B. Statutory Grounds

Clara argues that Montana's statutory scheme does not provide the District Court the authority to compel a psychiatric and psychological evaluation of a defendant who asserts the affirmative defense of justifiable use of force based on battered woman syndrome under §§ 46-15-323, -324, -331, and -332, MCA (1989). Clara further argues that statutes governing the procedure for mental evaluation when mental state is an issue, §§ 46-14-101 to -313, MCA (1989), are inapplicable here because the defense of justifiable use of force based on battered woman syndrome

does not place a defendant's mental state at issue and these statutes do not expressly provide for battered woman syndrome.

We hold that §§ 46-15-323, -324, -331, and -332, MCA (1989), are inapplicable because, as previously discussed, Clara put her mental state at issue when she relied upon the defense of justifiable use of force based on battered woman syndrome and offered the testimony of Dr. Lenore Walker in support of that defense. The applicable statute, § 46-14-212, MCA (1989), authorizes the State to request a mental evaluation once the defendant's mental state is at issue. Furthermore, the District Court had authority to apply §§ 46-14-202 to -313, MCA (1989), without specific statutory reference to the defense of justifiable use of force based on battered woman syndrome. See State v. Briand (N.H. 1988), 547 A.2d 235, 237. We therefore hold that § 46-14-212, MCA (1989), provided the District Court the authority to compel Clara to undergo a psychiatric and psychological evaluation by expert witnesses chosen by the State for the limited purpose of rebuttal. We further hold that the District Court had the right to sanction Clara when she twice refused to cooperate with undergoing the court-ordered evaluation under § 46-15-329, MCA (1989).

2. Did the District Court err by giving inappropriate jury instructions?

Clara argues that the District Court erred when it refused her instructions on 1) presumption of innocence and 2) deliberation. Clara further argues that the District Court should have given instructions that the testimony of law

officers should not be given special credibility and that the State bears the responsibility to disprove the theory of self-defense.

We hold that the District Court properly refused Clara's instructions on presumption of innocence and deliberation because they are repetitive, conflict with the instructions already approved by the District Court, and are redundant. Furthermore, the District Court was not bound to give jury instructions concerning the credibility of law officer testimony because these instructions were never offered at trial, and this Court has never held these instructions as necessary to avoid reversible error. We therefore hold that the District Court committed no error in refusing these jury instructions.

In conclusion, we affirm Clara Hess's conviction of the mitigated deliberate homicide of her husband, William "Bill" Hess.

s/ J. A. Turnage, Chief Justice

We concur:
s/ John Conway Harrison
s/ Karla M. Gray
s/ William E. Hunt, Jr.
s/ Terry Triewiler
s/ R. C. McDonough
s/ Fred J. Weber

Petition under 28 USC § 2254 for Writ
of Habeas Corpus by a Person in State Custody

UNITED STATES DISTRICT COURT, District of Montana

Name: Clara Hess Prisoner No. 32268

Place of Confinement: Women's Pre-Release Center, 62 West Broadway, Butte, Montana

Name of Petitioner		Name of Respondent
CLARA HESS	v.	STEVEN MacASKILL

The Attorney General of the State of Montana - Joseph P. Mazurek, Justice Building, 215 North Sanders, Helena, Montana 59620

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Sixth Judicial District Court, Livingston, Montana.

2. Date of judgment of conviction: October 30, 1990

3. Length of sentence: See attached

4. Nature of offense involved (all counts) The Defendant, Clara Hess, was charged by an Information filed in the District Court on October 23, 1989, with the crime of

Deliberate Homicide, a Felony.

5. What was your plea? Not guilty.

6. If you pleaded not guilty, what kind of trial did you have? Jury

7. Did you testify at the trial? Yes.

8. Did you appeal from the judgment of conviction? Yes.

9. If you did appeal, answer the following:

(a) Name of court: Supreme Court of the State of Montana

(b) Result: Affirmed.

(c) Date of result and citation, if known: 3/10/92 - State v. Hess, 828 P.2d 382 (Mont. 1992).

(d) Grounds raised: See attached

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court: Sentence Review

(2) Result: Reduction in sentence was denied.

(3) Date of result and citation, if known:

(4) Grounds raised: This proceeding was simply to secure

a reduction or change in the sentence.

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal: N/A

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state of federal? No.

11. If your answer to 10 was "yes", give the following information: N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

A. Ground one: The conviction was obtained by a violation of the privilege against self-incrimination.

Supporting FACTS (state *briefly* without citing cases or law) In this case Petitioner was required to submit to a psychological and psychiatric examination by order of the Court and without counsel. Such experts were permitted to

be in the courtroom as an exception to the exclusion of witnesses and testified on behalf of the State.

B. Ground two: The Petitioner was not given her Miranda rights prior to any examination or was she given the opportunity to exercise her right to not give a statement or submit to such examination.

Supporting FACTS (state *briefly* without citing cases or law) In this case it appears without contradiction that prior to any examination by state experts Petitioner was not apprised of her constitutional rights.

C. Ground three: Petitioner was not permitted the assistance of counsel under the Sixth Amendment to the Constitution with respect to the examination by state experts who became witnesses for the prosecution.

Supporting FACTS (state *briefly* without citing cases or law) The facts in this case as shown by the transcript did not permit counsel to be present during the examination but the Order provided that the attorney could be outside the room and could confer with the client/petitioner.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them: N/A. All grounds were presented to the Supreme Court of the State of Montana and all State remedies have been exhausted.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under

attack? No.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Charles F. Moses

(b) At arraignment and plea: Charles F. Moses

(c) At trial: Charles F. Moses

(d) At sentencing: Charles F. Moses

(e) On appeal: Charles F. Moses

(f) In any post-conviction proceeding? N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding: N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? No.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? No.

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

signature lines

Attachment to Petition for
Writ of Habeas Corpus for
Clara Hess - #32268

3. Length of Sentence:

Thirty years confinement plus enhancement of term of five years for use of a weapon to be served consecutively. Fine of $15,000 and a surcharge of $20.00. Designated as a non-dangerous offender.

9(b). Grounds Raised:

(1) Violation of the Fifth Amendment raised against self-incrimination.

(2) Failure to advise the Defendant of her rights under *Miranda v. Arizona*, before examination.

(3) Failure to have the assistance of counsel under the Sixth Amendment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CLARA M. HESS,	)	
	)	
Petitioner,	)	CV 93-133-BLG-RWA
	)	
v.	)	MEMORANDUM
	)	AND ORDER
STEVEN MacASKILL,	)	
	)	
Respondent.	)	

Pending before the Court are cross-motions for summary judgment in this habeas corpus action under 28 U.S.C. § 2254. For the reasons stated below, Respondent's motion is granted and Petitioner's motion is denied.

I.
BACKGROUND

On October 24, 1989, Petitioner Clara Mae Hess pled "not guilty" to a charge of deliberate homicide in the Montana State District Court, arising out of the shooting death of her husband. At an omnibus hearing on December 11, 1989, Petitioner gave notice of her intent to assert the defense of justifiable use of force, based upon what is known as the "battered woman's syndrome". Petitioner further notified the court that a well-known expert on that subject, Ms. Lenore Walker, would testify on her behalf at trial.

Thereafter, Respondent sought a court order

compelling Petitioner to submit to a psychiatric/psychological evaluation by the State's experts, Dr. Al Walters and Dr. William Stratford, at State expense. By Order dated February 5, 1990, the Court granted Respondent's motion, but limited the scope of the examinations by providing that "such evaluation shall be made subject to defendant's constitutional and statutory rights not to make statements or produce documents that may incriminate her, that the state's counsel and witnesses may use such examination only for determining the mental condition of defendant and for rebuttal, and that all experts and counsel shall keep their records and reports confidential except as necessary for use in trial of this case." The Court also stated that "[Petitioner's] attorney may attend and be present at his own expense."

Petitioner appeared at the date and times set for the court-ordered examinations, but refused to participate in the examinations. Respondent therefore moved to exclude trial testimony from Petitioner's expert on the subject of battered woman's syndrome. On March 27, 1990, the Court granted the motion and excluded Ms. Walker from testifying as an expert at trial, unless Petitioner submitted to the previously ordered examinations. The Court further clarified Petitioner's counsel's role, stating that Petitioner's counsel "may be present in the waiting room of such examiner and may counsel defendant at recesses and meals." On April 9, 1990, Petitioner notified the court that she did not intend to submit to the examinations. On April 11, 1990, the Court entered an order excluding Petitioner's expert witness, as a sanction for her noncompliance.

Petitioner ultimately submitted (under protest) to the

examinations in July, 1990. All three experts (Ms. Walker, Dr. Walters and Dr. Stratford) were permitted to testify at trial. The jury returned a verdict finding Petitioner guilty of mitigated deliberate homicide. Petitioner was sentenced to prison term of thirty years, plus an additional five years under Montana's weapon enhancement statute, Mont. Code Ann. § 46-18-221.

Petitioner appealed the district court's decision compelling her to submit to examinations by the State's experts, contending that it violated her rights under the Fifth and Sixth Amendments to the United States Constitution. The Montana Supreme Court found that Petitioner "put her mental state at issue when she relied upon the affirmative defense of justifiable use of force and offered psychological evidence . . . to support that defense. Accordingly, the State was entitled to have [Petitioner] examined by expert witnesses of its own choosing and to have these expert witnesses testify for the limited purpose of rebutting [Petitioner's expert's] testimony." State v. Hess, 828 P.2d 382, 386 (Mont. 1992) (citation omitted). As such, "[Petitioner's] Fifth Amendment right against self-incrimination was not violated." Id.

The Montana Supreme Court further found that Petitioner was not entitled to Miranda warnings prior to the examinations, and that her Sixth Amendment right to counsel as not violated by the district court's orders. Id. at 386.

After exhausting her remedies on appeal with the Montana Supreme Court, Petitioner filed the present petition for habeas corpus relief under 28 U.S.C. § 2254 on August

10, 1993. Both parties have submitted cross-motions for summary judgment. After consideration of the briefs and supporting materials submitted by the parties, the Court rules as follows:

II.
DISCUSSION

The issues raised by this petition are (1) whether Petitioner's rights under the Fifth Amendment to the United States Constitution were violated when the Montana State District Court ordered her to submit to psychiatric/ psychological evaluations by experts of Respondent's choosing, after Petitioner asserted the defense of justifiable use of force based on the battered woman's syndrome; (2) whether Petitioner had a Fifth Amendment right to be given her Miranda rights prior to the court-ordered examinations; and (3) whether Petitioner had a Sixth Amendment right to have her counsel present during the court-ordered examinations.

At the outset, the Court notes that although Petitioner has cited to numerous Montana statutory and constitutional provisions in support of her petition, § 2254 is intended to remedy only violations of "the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The Court therefore limits its analysis to the federal constitutional questions raised by the petition.

A. Fifth Amendment Violations

Petitioner first contends that the state violated her Fifth Amendment right against self-incrimination by compelling her to submit to an examination by the State's experts. The majority of federal courts recognize that "a

defendant may be compelled to submit to a psychiatric exam when he or she raises the defense of insanity," so that the State is afforded an opportunity to respond to the opinions of the defendant's expert witnesses. State v. Schackart, 858 P.2d 639, 645 (Ariz. 1993) (citing numerous cases). "[T]he underlying concern is that in order for the State to be able to bear effectively its burden of proving guilt, or of meeting an affirmative defense, it must have the means to adequately assess and, if necessary, rebut a defendant's expert psychiatric testimony." Hartless v. State, 611 A.2d 581, 584 (Md.App. 1992).

Although the battered woman's syndrome was presented in this case in the context of a defense of justifiable use of force, and not as a defense of "mental disease or defect" under Montana law, it similarly involves "the matter of insight into the operations of [Petitioner's] mind, which [Petitioner sought] to illuminate and explain through the testimony of experts who have had the opportunity to examine her." State v. Myers, 570 A.2d 1260, 1266 (N.J.Super 1990). Thus, the reasoning which permits court-ordered psychiatric examinations at the request of the State in insanity cases is equally persuasive here, and "the management of the constitutional implications of defendant's statements to the examining experts should be essentially the same." Id. at 1266.

Once Petitioner gave notice of her intent to rely upon the defense of self defense due to the battered woman's syndrome, and to support that defense by expert psychological evidence, the State was entitled to conduct its own evaluation of Petitioner for rebuttal purposes. United States v. Vega-Penarete, 137 R.F.D. 233 (E.D.N.D. 1991);

see also Myers, 570 A.2d 1260; Schackart, 858 P.2d 639; State v. Briand, 547 A.2d 235 (N.H. 1988); State v. Nizam, 771 P.2d 899 (Haw.App. 1989); State v. Hutchinson, 766 P.2d 447 (Wash. 1989). The Court had the inherent power to enter an order compelling an examination, and also to exclude Petitioner's expert if she refused to comply with that Order. Nizam, 771 P.2d at 901.

> Courts have inherent authority to order a defendant to submit to a psychiatric examination by the state's expert where the defendant raises a defense requiring psychiatric testimony and introduces such testimony in support of the defense. The courts' inherent authority is grounded on the courts' responsibilities both to promote the ascertainment of truth and to insure the orderliness of judicial proceedings.

Id.; see also United States v. Nobles, 422 U.S. 225 (1975); United States v. Malcolm, 475 F.2d 420 (9th Cir. 1973); United States v. Richter, 488 F.2d 170, 173 (9th Cir. 1973) (District courts have "wide latitude . . . to carry out successfully [their] mandate to effectuate, as far as possible, the speedy and orderly administration of justice."). "To hold otherwise would deprive the State of the only adequate means to contest the conclusions of a defense psychiatric expert." Schackart, 858 P.2d at 645 (citing United States v. Byers, 740 F.2d 1104, 1111-13 (D.C.Cir. 1984)).

The Petitioner relies on several cases, primarily Estelle v. Smith, 451 U.S. 454 (1981), in support of her

contention that a court-ordered psychological evaluation violated her Fifth Amendment right against self-incrimination. However, that reliance is misplaced. In Estelle, the United States Supreme Court found that the defendant's Fifth Amendment rights were violated when the lower court, sua sponte, ordered a psychiatric evaluation to determine whether defendant was competent to stand trial, and later permitted the examining psychiatrist to testify at sentencing. The Supreme Court specifically noted that "[the] psychiatric evaluation was ordered even though defense counsel had not put into issue Smith's competency to stand trial or his sanity at the time of the offense." Id. at 456 n. 1. Those facts differ from the present case, in which Petitioner claimed that she suffered from battered woman's syndrome and offered expert testimony in support of that defense. See id, at 465 (distinguishing Estelle from those cases in which a defendant claims a diminished mental condition and offers supporting psychiatric testimony).

Moreover, in Estelle, the United States Supreme Court stated that "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he has interjected into the case." Id. at 465. Petitioner's silence is equally unfair to the State in a case such as this, where the defendant intends to offer psychiatric/psychological expert testimony in support of a defense based on battered woman's syndrome. Estelle therefore supports this Court's determination that Petitioner may not raise such a defense and then assert her Fifth Amendment rights to preclude the State from conducting its own inquiry into the validity of

her defense. "[T]hat is somewhat analogous to the rule that a defendant who elects to testify at trial may not invoke the self-incrimination privilege to avoid cross-examination." Schackart, 859 P.2d at 645 (citations omitted).

Likewise, in Buchanan v. Kentucky, 483 U.S. 402 (1987), the Supreme Court recognized that if a defendant asserts a mental-status defense supported by expert psychiatric/psychological testimony, he waives any Fifth Amendment objection to the use of evidence derived from the examination by the prosecution to rebut his defense. Id, at 423; see also Powell v. Texas, 492 U.S. 680, 684 (1989).

For these reasons, the Court concludes that when Petitioner raised the defense of battered woman's syndrome and supported that defense with expert testimony, she waived her Fifth Amendment right to object to a psychiatric/psychological examination by Respondent's experts. The district court therefore did not violate Petitioner's Fifth Amendment right against self-incrimination by requiring her to either submit to such an examination, or face exclusion of her own expert testimony at trial. Respondent is entitled to summary judgment in its favor on this claim.[1]

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[1] The district court stated in its order that "such evaluation shall be made subject to defendant's constitutional and statutory rights not to make statements or produce documents that may incriminate her . . . ." Thus, Petitioner was actually provided greater protection than2 she was entitled to, since she waived her Fifth Amendment

For essentially the same reasons, Petitioner's constitutional rights were not violated by the failure to provide her with Miranda warnings prior to the examinations. See, e.g., Hendricks v. Vasquez, 974 F.2d 1099, 1108 (9th Cir. 1992) (citing Powell v. Texas, 492 U.S. 680, 684 (1989)); McNeill v. Fulcomer, 753 F.Supp. 1294, 1299 (E.D.Pa.1990). Respondent is entitled to summary judgment on this claim, as well.

B. Sixth Amendment Violations

Petitioner next contends that her Sixth Amendment right to counsel was violated by the Court's order requiring her to submit to a psychiatric/psychological evaluation, without representation by counsel during the examination. It is established that a defendant is entitled to the assistance of counsel before submitting to a court-ordered psychiatric evaluation. Estelle, 451 U.S. at 469-71; United States v. Garcia, 739 F.2d 440, 442 (9th Cir. 1982). However, the majority of courts have found that a defendant has no constitutional right to have counsel physically present during the examination. See, Schackart, 858 P.2d at 646 (and cases cited therein); see also United States v. Bondurant, 689 F.2d 1246, 1249 (5th Cir. 1982). By providing Petitioner with advance notice of the examinations and permitting her counsel to be available to her in the waiting room or by telephone, the Court adequately protected Petitioner's Sixth Amendment right to counsel.

Based on the foregoing,

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rights by asserting the battered woman's syndrome as a defense.

IT IS ORDERED that Respondent's motion for summary judgment is granted, and Petitioner's cross-motion for summary judgment is denied.

The Clerk is directed to forthwith notify counsel of record of the making of this Order.

Done and dated this 4th day of March, 1994.

s/ Richard W. Anderson
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CLARA M. HESS,	)	
	)	
Petitioner,	)	CV 93-133-BLG-RWA
	)	
v.	)	MEMORANDUM
	)	AND ORDER
STEVEN MacASKILL,	)	
	)	
Respondent.	)	

Pending before the Court is Petitioner's Request for New Trial, pursuant to Rule 59(a), Red.R.Civ.P., or to alter or amend the Judgment pursuant to Rule 52, Fed.R.Civ.P.. For the reasons stated below, Petitioner's motion is denied.[1]

At the outset, the Court notes that this motion is more properly viewed as a motion for reconsideration under Rules 59(e) and/or 60(b), Fed.R.Civ.P., since the Judgment at issue was the result of summary judgment proceedings

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[1] The parties have previously consented to the United States Magistrate Judge conducting all proceedings in this matter, including the entry of a final Judgment. See Order of October 4, 1993. Defendant's opposition to the Plaintiff's motion is therefore not well taken, since it presupposes a lack of such consent.

and not a trial on the merits.[2] Regardless of the stated grounds, Petitioner essentially seeks reconsideration of the Court's order of March 4, 1994, granting summary judgment in favor of Respondent in this matter. "A litigant may move the court to reconsider a grant of summary judgment pursuant to Rule 59(e) or Rule 60(b). However, to avoid being frivolous, such a motion must provide a valid ground for reconsideration." All Hawaii Tours v. Polynesian Cultural Center, 116 F.R.D. 645 (D.Haw. 1987), aff'd in part, rev'd in part on other grounds, 855 F.2d 860.

"In order to justify reconsideration of an order, a party must show that there has been some intervening development in the law, some new evidence not previously available, or that the prior order is in clear error or would operate to create a manifest injustice." Leong v. Hilton Hotels Corp., 689 F.Supp. 1572, 1573 (D.Haw. 1988); accord Boone v. United States, 743 F.Supp. 1367 (D.Haw. 1990; Kern-Tulare Water District v. City of Bakersfield, 634 F.Supp. 656, 665 (E.D.Cal. 1986). A motion for reconsideration which presents no new arguments should be denied. Backlund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985).

The present motion is apparently based upon the third ground. However, Petitioner has presented no

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[2] Rule 52(b) addresses amendment of factual findings made by a judge sitting without a jury or with an advisory jury; Rule 59(a) refers to a motion for a new trial, following a trial of the issues. Neither provision applies here.

arguments which were not previously considered by the Court. The court has reviewed its prior order and finds that it was properly entered. Accordingly,

IT IS ORDERED that Petitioner's post-Judgment motion for new trial or to alter or amend the Judgment is DENIED.

The Clerk is directed to forthwith notify counsel of record of the making of this order.

Done and dated this 14th day of April, 1994.

s/ Richard W. Anderson
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CLARA M. HESS,	)	
	)	
Petitioner,	)	CV 93-133-BLG-RWA
	)	
v.	)	NOTICE OF
	)	APPEAL
STEVEN MacASKILL,	)	
	)	
Respondent.	)	

Notice is hereby given that Clara M. Hess, petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment in a Civil Case with supporting Memorandum and Order entered in this action on March 4, 1994, and from the Memorandum and Order denying petitioner's motion for new trial or for reconsideration entered in this action on April 14, 1994.

DATED this 2nd day of May, 1994.

MOSES LAW FIRM
P. O. Box 2533
Billings, MT 59103-2533

By: s/ Charles F. Moses
Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served by United States mail upon all counsel of record on the 2nd day of May, 1994.

s/ Charles F. Moses